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An Overhead View of *Aitken* and *Herlinger*

BY: KENNETH H. RYESKY*

In 1994, the New York County Surrogate's Court issued two decisions, *Estate of Aitken*[1] and *Estate of Herlinger*.[2] Some puzzlements for the Bar are still drifting in the wake of those two decisions.

In the context of Surrogate's Court practice, it is well settled that the Court has inherent power to supervise and regulate the compensation of attorneys appearing before it,[3] even if none of the

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[1] Estate of Aitken, 160 Misc.2d 587, 610 N.Y.S.2d 436 (Surr. Ct. N.Y. Co. 1994).

[2] Estate of Herlinger, N.Y.L.J., April 28, 1994 at 28, col. 6 (Surr. Ct. N.Y. Co.).

[3] *E.g.*, Gair v. Peck, 6 N.Y.2d 97, 188 N.Y.S.2d 491, 160 N.E.2d 43 (1959), *appeal dism'd, cert. den.* 361 U.S. 374, 80 S.Ct. 40, 4 L.Ed.2d 380 (1960); *see also* Matter of Freeman, 34 N.Y.2d 1, 10, 355 N.Y.S.2d 336, 341-42, 311 N.E.2d 480, 484-85 (1974).

The factors used by Surrogates and other New York courts in determining attorneys' fees is a topic beyond the ambit of this article. Extensive discussion of such matters can be found in the *Freeman* case, and in Matter of Potts, 213 App.Div. 59, 209 N.Y.Supp. 655, *aff'd* 241 N.Y. 510, 150 N.E. 533 (1925). Courts in other states apply factors similar to those enumerated in *Freeman* and *Potts*, *cf., e.g.,* LaRocca Estate, 431 Pa. 542, 246 A.2d 337 (1968).

parties object to the fee charged.[4] Certain individual Surrogates have earned reputations among the Bar as draconian attorney fee bashers.[5]

The more exacting Surrogate's decisions are carefully noted by Internal Revenue Service Estate Tax examination personnel, who frequently use such decisions as authority for disallowing deductions for attorney fees and other administrative expenses on Federal estate tax returns.[6] IRS estate tax attorneys view the more meticulous Surrogates as their valued allies in that regard.[7]

One issue of frequent concern to the more stringent of the local Surrogate's benches is the charging of clients for items of office overhead. What is office overhead? As noted in the *Aitken* decision,

> "the concept of 'office overhead' in the case law is often invoked but never explained. The most commonly cited decision is *Matter of Zalaznick* (NYLJ, Nov. 19, 1976, at 11, col. 1, *aff'd* 61

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[4] *E.g.*, Stortecky v. Mazzone, 85 N.Y.2d 518, 626 N.Y.S.2d 733, ___ N.E.2d ___ (1995); *see also* Matter of Verplanck, 151 A.D.2d 767, 543 N.Y.S.2d 138 (2d Dept. 1989); Estate of Frank Rich, N.Y.L.J., 9/11/92 at 26 (Surr. Ct. Westchester Co.); Estate of Steve Mascanis, N.Y.L.J., 11/25/91 at 31 (Surr. Ct., Suffolk Co.); Matter of Clifford Jackson, N.Y.L.J., 11/19/91 at 29 (Surr. Ct. Westchester Co.); Estate of Hugh J. B. Cassidy III, N.Y.L.J., 10/29/90 at 30 (Surr. Ct., Suffolk Co.).

The *Stortecky* opinion does caution that while the Surrogate's Courts are empowered to review the attorney fees *sua sponte*, that power should be exercised very cautiously. *Stortecky* at 526, 626 N.Y.S.2d at 737.

[5] *See, e.g.* Timothy R. Dougherty, "Dual Estate Fees Under Fire in NY", Newsday (Long Island, NY), October 23, 1989 at 5 (Quoting Hon. Ernest Signorelli, then Surrogate of Suffolk County: "It's not my role to enrich lawyers."). In all fairness to Judge Signorelli, it must be noted that he has in fact allowed increases in attorney's fees when convinced that the circumstances warranted such increases, *see, e.g.* Estate of George W. Stretch, N.Y.L.J., 9/21/93 at 26, col. 2 (Surr. Ct. Suffolk Co.).

[6] *See, e.g.* Robert A. Traylor, "The Fox is on the Town, O!: *White v. United States*", N.Y. STATE BAR JOURNAL, April 1990, at 42. Deductions allowable in determining the Federal Estate Tax must be allowable under the laws of the jurisdiction where the estate is being administered, I.R.C. § 2053(a). Therefore, a claimed deduction for attorney's fees can be disallowed by the I.R.S. to the extent that it would be found excessive by the Surrogate's Courts.

[7] On November 15, 1988, the Hon. Louis D. Laurino, then Queens County Surrogate, was warmly received by the IRS Manhattan District Estate Tax Examination branch (which then included the author) as a guest speaker on the topic of attorney fees.

A.D.2d 772, 402 N.Y.S.2d 973), but the mention of overhead there is merely conclusory." [8]

Items commonly disallowed by the Surrogates as "office overhead" include, *inter alia*, postage[9], telephone calls[10], messenger service[11], photocopying[12], fax charges[13], calendar watching services[14], travel[15],

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[8] *Aitken* at 588-89, N.Y.S.2d at 438 (Surr. Ct. N.Y. Co. 1994).

[9] *E.g.*, Estate of Joan Carol Lee, N.Y.L.J., June 29, 1988 at 24 (Surr. Ct. Bronx Co.); Estate of Earl E. Gayle, N.Y.L.J., June 17, 1993 at 26, col. 4 (Surr. Ct. Queens Co.); Estate of Sharon Meranus, N.Y.L.J., March 31, 1994 at 37, col. 2 (Surr. Ct. Suffolk Co.); Estate of Erna M. Ferguson, N.Y.L.J., April 26, 1994 at 26, col. 5 (Surr. Ct. Suffolk Co.); Estate of Diane Lavender, N.Y.L.J., May 24, 1994 at 27, col. 3 (Surr. Ct. Westchester Co.); Matter of Henry C. Kimbrough, N.Y.L.J., June 26, 1995 at 33, col. 6 (Surr. Ct. Westchester Co.).

[10] *E.g.*, Estate of Joan Carol Lee, N.Y.L.J., June 29, 1988 at 24 (Surr. Ct. Bronx Co.); Estate of Horace Havemeyer, Jr., N.Y.L.J., September 26, 1994 at 32, col. 4 (Surr. Ct. Suffolk Co.); Matter of Henry C. Kimbrough, N.Y.L.J., June 26, 1995 at 33, col. 6 (Surr. Ct. Westchester Co.).

[11] *E.g.*, Estate of Joan Carol Lee, N.Y.L.J., June 29, 1988 at 24 (Surr. Ct. Bronx Co.); Estate of Earl E. Gayle, N.Y.L.J., June 17, 1993 at 26, col. 4 (Surr. Ct. Queens Co.); Matter of John S. Nugent, N.Y.L.J., April 17, 1995 at 34, col. 5 (Surr. Ct. Westchester Co.); Estate of Horace Havemeyer, Jr., N.Y.L.J., September 26, 1994 at 32, col. 4 (Surr. Ct. Suffolk Co.).

[12] *E.g.*, Estate of Barbara Lee Joe, N.Y.L.J., July 19, 1995 at 29, col. 6 (Surr. Ct. Queens Co.); Matter of John S. Nugent, N.Y.L.J., April 17, 1995 at 34, col. 5 (Surr. Ct. Westchester Co.); Estate of Sharon Meranus, N.Y.L.J., March 31, 1994 at 37, col. 2 (Surr. Ct. Suffolk Co.); Estate of Erna M. Ferguson, N.Y.L.J., April 26, 1994 at 26, col. 5 (Surr. Ct. Suffolk Co.); Estate of Herbert M. Morrison, N.Y.L.J., February 9, 1994 at 22, col. 4 (Surr. Ct. N.Y. Co.). It is noted that the *Morrison* case, a New York County decision, was decided prior to the *Aitken* decision's reconsideration of the case law.

[13] *E.g.*, Estate of Sharon Meranus, N.Y.L.J., March 31, 1994 at 37, col. 2 (Surr. Ct. Suffolk Co.); Estate of Erna M. Ferguson, N.Y.L.J., April 26, 1994 at 26, col. 5 (Surr. Ct. Suffolk Co.); Estate of George D. Sold, N.Y.L.J., March 7, 1994 at 34, col. 5 (Surr. Ct. Queens Co.); Matter of Anna Seeff, N.Y.L.J., June 26, 1995 at 34, col. 1 (Surr. Ct. Westchester Co.); Estate of Anthony Cocuzza, N.Y.L.J., January 18, 1995 at 31, cols. 3-4 (Surr. Ct. Westchester Co.).

[14] *E.g.*, Estate of Barbara Lee Joe, N.Y.L.J., July 19, 1995 at 29, col. 6 (Surr. Ct. Queens Co.); Estate of Thomas Reynen, N.Y.L.J., September 21, 1994 at 26, col. 4 (Surr. Ct. Queens Co.), *modified to correct typographical error*, N.Y.L.J., September 23, 1994 at 26, col. 2 (Surr. Ct. Queens Co.).

[15] *E.g.*, Matter of Anne Cam, N.Y.L.J., March 14, 1995 at 31, col. 2 (Surr. Ct. Westchester Co.); Estate of Liana M. Suarez, N.Y.L.J., February 4, 1994 at 29, col. 2 (Surr. Ct. Westchester Co.); Estate of George D. Sold, N.Y.L.J., March 7, 1994 at 34, col. 5 (Surr. Ct. Queens Co.); Estate of Horace Havemeyer, Jr., N.Y.L.J., September 26, 1994 at 32, col. 4 (Surr. Ct. Suffolk Co.).

tolls and parking[16], collating and filing[17], research (including on-line data base searches),[18] and lawyers' service companies[19]. Conventional accounting wisdom held that the required recordkeeping time and effort did not justify matching those items with individual cases, so the costs of such items were simply charged to office overhead. To separately charge clients for items already included in office overhead would accordingly amount to double billing, which the courts seek to avoid. Office automation technologies have changed those ancient truths, however. Items such as telephone calls and photocopying can now be simply and automatically quantified and charged to specific clients and cases[20], and hence, can now be "unbundled" from office overhead.

But courts, by their very nature, are necessarily driven by precedent. A judge's expertise is in the law, and not necessarily in the developing technological fields. Wary of the dangers inherent when a technical layman plays the role of a technical expert, judges are most reluctant to make major adjustments to tried and proven legal theories

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[16] *E.g.*, Estate of Maybelle Frost Vasbinder, N.Y.L.J., February 27, 1995 at 37, col. 1 (Surr. Ct. Westchester Co.); Estate of George D. Sold, N.Y.L.J., March 7, 1994 at 34, col. 5 (Surr. Ct. Queens Co.).

[17] Garis v. Wanderman, N.Y.L.J., April 19, 1994 at 27, col. 4 (City Ct., Yonkers, Westchester Co.).

[18] Estate of Joan Carol Lee, N.Y.L.J., 6/29/88 at 24 (Surr. Ct. Bronx Co.) (Disbursement for Lexis disallowed); Estate of James Barry, Jr., N.Y.L.J., 11/15/93 at 33, col. 1 (Surr. Ct. Queens Co.) ("Research disallowed as are law office overhead).

[19] Estate of Matthew Barbiere, N.Y.L.J., 9/25/95 p. 31 col. 6 (Surr. Ct. Queens Co.).

[20] Several products are now available which can track the use of telephone calls, faxes and copy machines to individual clients. *See, e.g.*, Equitrac Corp., advertisement, *Law Technology Product News*, September 1995, at 15 ("Equitrac's systems offer the most advanced, easy, accurate and reliable means of detailing, reducing, and recovering client-related office expenses."; CATALOG, HELLO DIRECT (SAN JOSE, CA) at p. 38 (Winter 1995) (Product known as "CallCost" will, *inter alia*, "[p]rint reports showing phone activity by line, client or account code."); ALUMNI COMPUTER GROUP (BUFFALO NY), PC LAW FOR WINDOWS at 23 (undated brochure in possession of author) ("With the *Remote Hookup* (Disbursement Recovery) module, information from your firm's cost recovery system (i.e. telephone, fax or photocopier) will be automatically transferred int PC LAW or PC LAWjr. You will save time and reduce errors because you don't have to reenter any data. Charges are automatically recovered and appear on Client Ledger cards."); E. J. Lody, Dealer Sales Director, Accountor Systems (Westchester, IL), Letter with attachments to the author (October 6, 1995) (In possession of author).

at the first appearance of a new technical innovation.[21] Accordingly, many local Surrogates, feeling bound to the old case law, have been deeply ingrained to disallow claimed attorney reimbursements which the old case law wisdom had painted as "overhead" items.[22]

Acknowledging that the modern legal office with the latest technology "is not the world that existed when the office overhead rules were promulgated" [23], Surrogate Roth indicated in *Aitken* that her court would consider allowing disbursements for charges which, although traditionally thought of as overhead items, are actually directly charged to the client, if the law firm submits a responsible partner's written affirmation that the disbursements requested are in fact "unbundled".

Approximately one month later, Surrogate Preminger decided *Herlinger*, adopting the *Aitken* rule that attorneys may apply for reimbursements of traditionally "overhead" items upon a showing that such items had in fact become "unbundled" at the law firm in question. The *Aitken* and *Herlinger* decisions thus establish precedent for allowance of formerly nonreimbursable items under the appropriate circumstances.

Like most new rule innovations, however, there are questions remaining as to how the rule in the *Aitken* and *Herlinger* cases will be implemented. For starters, some sort of a split of authority within the New York County Surrogate's Court appears to persist between Surrogates Roth and Preminger. In *Aitken*, Surrogate Roth states thus:

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[21] The practice of a judge playing armchair technical expert is not necessarily a bad thing. Many well-reasoned judicial decisions have been rendered where the jurist assumes the part of the expert. *See, e.g.* People v. Morris Rubin, N.Y.L.J., Sept. 14, 1994 at 26, col. 6 (Justice Ct. Vill. of Valley Stream) (Judge assumed the role of architectural historian); Djordjevic v. King Bear Auto Service Center, N.Y.L.J., November 14, 1994 at 32, col. 1 (City Ct., Yonkers, Westchester Co.) (Automobile mechanic); Bloor v. Falstaff Brewing Corp., 454 F.Supp. 258, 260-63 (S.D.N.Y., 1978), *aff'd* 601 F.2d 609 (2d Cir. 1979) (Beer connoisseur).

[22] *See, e.g.* Estate of Allen D. Tanney, N.Y.L.J., April 19, 1995 at 27, col. 1 (Surr. Ct. Westchester Co.) ("While the court is most sympathetic to the costs of running a law office, it is bound by the many customary well known guidelines in fixing attorney's fees.").

[23] *Aitken* at 590, 610 N.Y.S.2d at 438-39.

> "The court does not intend by this decision to define the type of equipment that should be in a law office. But in the future, when counsel seeks to charge as disbursements various supportive services, the court will consider them if a member of the firm with responsibility for its management affirms in writing that salaries and related costs for such services were not taken into account in computing the billing rates and that it is the normal practice of the firm to bill clients separately for these disbursements."[24]

In *Herlinger*, Judge Preminger criticizes her sister Surrogate's *Aitken* decision to the extent that it may be construed as giving the attorney unfettered discretion to determine what are reimbursable overhead items. There is no particular indication that Surrogate Roth actually intended her *Aitken* decision to be read as relinquishing all judicial authority to determine the allowability of any component of an attorney's fee, but Surrogate Preminger apparently wished to take no chances with ambiguities. Surrogate Preminger has reiterated her *Herlinger* rule in subsequent cases,[25] and indeed, has continued to highlight and assert the touted differences between her own *Herlinger* rule and the rule in *Aitken* set forth by Surrogate Roth.[26]

For her part, Surrogate Roth apparently has not actually conceded that there are any flaws in her *Aitken* rule, but neither has she sought an open showdown with Surrogate Preminger on the matter. Nor would she be well advised to get into such a contest with her sister

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[24] *Aitken* at 591, 610 N.Y.S.2d at 439.

[25] *See, e.g.*, Matter of Walter Lancer [sic, should probably be "Langer"] von Langendorff, N.Y.L.J., May 11 1994 at 32, col. 5 (Surr. Ct. N.Y. Co.); Estate of Renate Hofmann, N.Y.L.J., June 8, 1994 at 24, col. 2 (Surr. Ct. N.Y. Co.); Estate of Helen Mosbacher, N.Y.L.J., August 10, 1994 at 22, col. 6 (Surr. Ct. N.Y. Co.); Wynyard v. Beiny, N.Y.L.J., November 25, 1994 at 30, col. 5 (Surr. Ct. N.Y. Co.); Estate of Edward J. Mogol, N.Y.L.J., 10/17/95 at 26, col. 6 (Surr. Ct. N.Y. Co.); Estate of Seth Minot Milliken, N.Y.L.J., 10/25/95 at 30, col. 1 (Surr. Ct. N.Y. Co.).

[26] *See* Wynyard v. Beiny, N.Y.L.J., November 25, 1994 at 30, col. 5 (Surr. Ct. N.Y. Co.) (S. Preminger), note 1 ("Counsel is reminded that this Court has rejected the approach to approval of disbursements adopted by Matter of Aitken, NYLJ, March 18, 1994, p. 22, col. 3, upon which counsel relies in its application.").

Surrogate, for Surrogate Preminger seems to have support among other Surrogates in other counties who have seen fit to take a fresh look at office overhead items.[27]

In that regard, another anomaly of the *Herlinger-Aitken* development is that while *Aitken* has been reported in the official New York Miscellaneous Reports and in the New York Supplement, *Herlinger*, apparently the better of the two decisions, has only appeared in the New York Law Journal and has not been reported in the New York Miscellaneous Reports or the New York Supplement, and is not cited in *New York Jurisprudence*. That situation will, if anything, obfuscate future legal research on the matter.

The simplest way to reconcile *Herlinger* and *Aitken* is to view *Herlinger* as interpreting and clarifying *Aitken* rather than being at odds with it.[28] Such an approach seems to be appropriate, for the differences between the *Herlinger* and *Aitken* decisions seem to be less of substance and more of style between their respective authors. After all, Surrogate Roth did state in her *Aitken* ruling that she would "consider" allowing certain disbursements requested by counsel;[29] she did not say that counsel may claim such disbursements as a matter of right. At least one other Surrogate has implicitly taken such a reconciliatory view of the *Herlinger* and *Aitken* rulings.[30]

It is not surprising that many Surrogates are reluctant to adopt the rule set forth in *Herlinger* and *Aitken*. Once the two cases are reconciled, the more daunting problems of putting the case law into practice would need to be addressed. In *Herlinger*, Surrogate Preminger explicitly states that "[a]ttorneys should not be permitted

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[27] *See* Estate of Charles F. Corwith, N.Y.L.J., May 3, 1995 at 35, col. 2 (Surr. Ct. Nassau Co.) ("more conservative" approach of *Herlinger* followed over that of *Aitken*, but no reimbursement allowed).

[28] If indeed the differences between the two decisions are allowed to persist as split authority within the New York County Surrogate's Court, then counsel's billing documentation strategy would necessarily be dependent upon which New York County Surrogate is assigned the case.

[29] *Aitken* at 591, 610 N.Y.S.2d at 439.

[30] *See* Estate of Lionell Sykes, N.Y.L.J., August 1, 1994 at 29, col. 5 (Surr. Ct. Bronx Co.) (Rationale of *Aitken* and *Herlinger* agreed with, but found not to apply in case at bar because in cause of action from decedent's death there was a contingency fee agreement based upon recovery amount. Office overhead and disbursements are irrelevant in such cases.).

to charge clients for expenses long considered to be part of law office overhead when there has not been a corresponding decrease in the hourly rate charged for legal services ..."[31] How would a brand new law firm show the "corresponding decrease" when the firm never existed without the modern law office technology? Suppose that for an established law firm, at the same time the photocopying costs became unbundled there was a rent increase. Would the two factors then offset one another in determining the firm's hourly billing rate? Would law firm billing rates require advance approval using procedures similar to those associated with rate increases by the electric and gas utilities?

The challenge of policing the Bar's compliance with *Herlinger* and *Aitken* can evoke all kinds of nightmares. It does not take much fantasizing to imagine teams of accountants being dispatched by the Surrogate's Court to audit a law firm and review its cost allocation system. Based upon that review, the law firm's overhead allocation is approved by the Surrogate (or Office of Court Administration). Law firms which have received a favorable audit report would be exempt from case-by-case approvals by the Court. That fantasy is not far-fetched, for it depicts the precise scenario that now exists for Federal government contractors, including and especially those doing business with the Department of Defense.[32] Recall also that many if

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[31] *Herlinger*.

Cf. Nassau Bar Ethics Opin. No. 94-25, N.Y.L.J., 11/14/94 at 5 (Permits reimbursement for specific identified items of office overhead if agreed to by the client, reflective of actual expense, and not duplicated in a "tack-on" charge. Similarly, a modest flat fee to cover such expenses is permissible if it reasonably reflects the lawyer's actual costs. The Opinion was promulgated a few months after *Aitken* and *Herlinger* were decided.).

[32] *Cf.* 48 C.F.R. Part 30, which provides for administration of Cost Accounting Standards upon certain Federal contractors; 48 C.F.R. § 44.102(b), which gives Federal contracting officers the authority to waive subcontract consent requirements for contractors whose purchasing systems have been reviewed and approved. The review process which Federal contractors must undergo is quite intrusive, *see, e.g.* K. H. Ryesky, *Government Reviews of Contractor Purchasing Systems*, MILITARY BUSINESS REVIEW, March/April 1987, p. 18 (written by the author when he himself conducted those intrusive reviews of contractors' purchasing systems for the Department of Defense); John A. Prokopy, *The Documentation Review*, CONTRACT MANAGEMENT, December 1987, p. 22; E. Kelly Hart, *Contractor Purchasing System Reviews*, CONTRACT MANAGEMENT, November 1985, p. 14.

not most of the overpriced military spare parts "horror stories" reported in the press during the mid-1980's[33] involved misallocations of overhead.[34]

Though the worst-case scenario suggested above is entirely possible in New York, the Bench and Bar need not take an alarmist outlook. It is clear that the law firms will continue to seek what they believe to be fair and justifiable recompense for their work. It is equally clear that the Surrogates will continue to intervene whenever they perceive abuses by some of the less considerate members of the Bar.[35] Yes, abuses and obstinacy by lawyers and judges may well nurture bedlam at the heels of *Aitken* and *Herlinger*. But if wiser minds prevail, the *Aitken* and *Herlinger* decisions may yet prove to be sound precedent for adapting the theory of the law to the reality of twenty-first century technology. It is well to note that even before *Aitken* and *Herlinger*, the Surrogates did take attorneys' particular overhead situations into consideration in fixing their fees.[36]

The reality is that office technology for tracking telephone, photocopy and faxing expenses to individual clients is becoming increasingly affordable to the small firm and solo practitioner. It is obvious that once the sharp corners are rounded, the rule articulated in *Aitken* and *Herlinger* will eventually be accepted by all Surrogates. But, as previously mentioned, courts will proceed with caution in

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[33] *See, e.g.,* Jim Martin, "The $3 Screwdriver and the $897 Purchasing System", DEFENSE SCIENCE & ELECTRONICS, July 1985, p. 5; Peter W. Bernstein, "What's Behind the Spare Parts Follies, FORTUNE, October 29, 1984, p. 123; Louis J. DeRose, "Negotiating Spare Parts", PURCHASING WORLD, April 1984, p. 36; Michael Weisskopf, "Navy Workshop Sells Ashtrays for $900 Apiece", Phila. Inquirer, June 2, 1985, p. 8-A; "Firm Admits Navy Bill Was a Bit High", Phila. Daily News, May 30, 1985, p. 13; Wade Fowler, "Public Seen Pounded by Navy's $436 Hammer", Evening News (Harrisburg, PA), April 4, 1985; James McCartney, "The Costly World of Pentagon Parts", Phila. Inquirer, August 2, 1984, p. 3-A; Gregory Gordon, "Navy Spent Hundreds Where Pennies Would Do, Audit Shows", Phila. Inquirer, July 11, 1983, p. 3-A.

[34] *See. e.g.* LORI COMEAU, NUTS AND BOLTS AT THE PENTAGON: A SPARE PARTS CATALOG (Defense Budget Project, Center on Budget and Policy Priorities (August 1984) at 3; AIR FORCE LOGISTICS COMMAND, MISSION SUPPORT PRICING ... TELLING THE WHOLE STORY (November 1986) at 5-6.

[35] *See, e.g.* Matter of Stalbe, 130 Misc.2d 735, 497 N.Y.S.2d 237 (Surr.Ct. Queens Co. 1985); Estate of George D. Sold, N.Y.L.J., 3/7/94 at 34, col. 5 (Surr. Ct. Queens Co.).

[36] *See, e.g.* Matter of Simon Gutner, N.Y.L.J., 4/26/93 at 32, col. 5 (Surr. Ct. Westchester Co.) (Fact that attorney has office overhead is a factor in fixing counsel fee).

adopting the *Aitken/Herlinger* rule. Attorneys should likewise proceed in a cautious and organized manner.

For one thing, it is obvious that the attorney who successfully pioneers the application of the *Aitken/Herlinger* rule in his or her local Surrogate's Court will have specifically addressed the matter in the retainer agreement with the client. Courts which are asked to break new legal ground strongly prefer that such ground be solid. The written agreement should clearly and explicitly state which traditional office overhead items will be directly charged to the client and at what rate, and preferably should contain a reasonable estimate of the expected total charge for each such item.

Aitken and *Herlinger* speak of written representations or affirmations by responsible partners as to the firm's normal billing practices. Individual Surrogates may well require supporting documentary substantiation in addition to a lawyer's bare word. Such substantiation might include office procedure manuals, copies of literature accompanying the relevant hardware and software, and/or reports from accountants or law office management consultants who have firsthand knowledge of the particular law firm. If and when submitting such documentation to the Court, the lawyer should be mindful of individual client confidences, inasmuch as papers submitted to the Court almost always become matters of public record. Submission to the court of, for example, a daily print-out listing telephone numbers and names of individual clients to whom the calls were charged may raise client confidentiality issues.

The items and amounts actually charged should be clearly identified. After all, the very thrust of the argument for adopting the *Aitken/Herlinger* rule is that modern technology has now made it possible to identify and quantify, with exactitude and efficiency, the disbursements in question. Disbursements of an ambiguous nature were disallowed by the various Surrogates even prior to *Aitken* and

Herlinger.[37] The courts certainly cannot and should not be expected to relax their standards for clearly identifying a particular disbursement if the *Aitken / Herlinger* rule is to be invoked.

As so aptly stated by Surrogate Roth in *Aitken*, "the bottom line is the court's concern, as mandated by statute, that the totality of fees and disbursements is reasonable. There is no inherent merit in any particular method of determining billings."[38] Will a war game develop between Bench and Bar as lawyers devote their time and energy to finding ways of protecting their fees from predatory Surrogates? That will depend upon the Surrogate's Courts and the attorneys who practice before them. Judicious application and adaptation of the rules by the Bench, coupled with reasonable and good faith billing practices by the Bar, can make all the difference in the world.

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[37] *See, e.g.* Matter of August Hall, N.Y.L.J., 4/20/93 at 27, col. 6 (Surr. Ct. Westchester Co.); Estate of Herbert M. Morrison, N.Y.L.J., 2/9/94 at 22, col. 4 (Surr. Ct. N.Y. Co.) (Many items listed not sufficiently identified, e.g., numerous entries for "petty cash".); Estate of George D. Sold, N.Y.L.J., 3/7/94 at 34, col. 5 (Surr. Ct. Queens Co.) ("The item set forth as Miscellaneous could be anything and is also disallowed."); Estate of Carol Yvonne Ray, N.Y.L.J., 2/4/94 at 23, col. 2 (Surr. Ct. Westchester Co.) ("petty cash" and "miscellaneous" items disallowed as reimbursable disbursements.); *cf.* Estate of Aaron Diamond, N.Y.L.J., 7/14/93 at 30, col. 1 (Surr. Ct. Westchester Co.), aff'd ___ A.D.2d ___, ___ N.Y.S.2d ___, N.Y.L.J., 9/29/95 at 32, col. 5 (2d Dept. 1995) ("In order to receive reimbursement for non-compensable disbursements, the attorney must justify the expense with detailed information concerning the circumstances which necessitated the expense and the unit cost.").

[38] *Aitken* at 591, 610 N.Y.S.2d at 439.